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No. 85-876

In The

# Supreme Court of the United States

October Term, 1985

JON A. VICARS,

*Petitioner,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,

*Respondent.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### I

### BRIEFS IN OPPOSITION MISPERCEIVE THE ISSUES RAISED IN THE PETITION

The briefs in opposition of responding real parties in interest and of amicus, City of Berkeley, misperceive the issues presented in the petition and the context in which

they arise. Vicars does not ask this Court to rule that the city has violated his constitutional rights. Such a claim would be raised in a different form of action with the city as a defendant. Such an action has indeed been filed. *See* Appendix to Brief of City of Berkeley at App. 1-15. The issue in this case is whether the application to Vicars of the Berkeley ordinance by a state court in a proceeding against third parties would cause a violation of his constitutional rights such that the ordinance should not be applied to him.

It is Vicars' position that the record clearly shows that he sought to remove himself from the occupation of providing rental housing and on that basis sought to eject the tenants who wanted him to continue in that service and would not voluntarily leave the premises. Vicars believes that the scope of his constitutional right to withdraw from this occupation extends to these circumstances. He willingly conceded to the tenants the right to notice and an opportunity to be heard prior to eviction. However, once it is established as it is on this record that he is withdrawing from the occupation, the city ordinance cannot compel him to stay and provide an unwilling service.

If this Court concludes that Vicars' rights are less extensive and depend upon alternatives to the unlawful detainer process, such as those asserted by the California Supreme Court in *Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984), *appeal dismissed*, 105 S. Ct. 174 (1985),[1] then Vicars' right to litigate those issues (which

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[1] The Court should recognize that there are significant differences between what Vicars is attempting to do and what Nash wished to do on the facts of his case. Petition for Certiorari at 11-12.

were defined by the California Supreme Court after this case was before the Appellate Department) was denied to him by the order of the lower court which sustained the demurrers without leave to amend. Appendix to Petition for Writ of Certiorari at C-2.

In either event this case presents the Court with the opportunity to define the scope of the constitutional liberty and associational interests at stake when an individual attempts to withdraw from a regulated occupation.

The briefs in opposition similarly misperceive the question of a taking of a property interest by a physical invasion. Under the facts of this case, Vicars does not challenge the authority of the city to regulate to some extent the relationship between him and his tenants including some manner of control over who could occupy the rental unit. Vicars' contention is that once he has decided to withdraw from the occupation and to have *no person* occupy the rental unit, it is a taking by physical invasion for the city to require Vicars to allow a beneficiary of the city's program to occupy the unit.[2]

Both of the issues presented in Vicars' petition were not before this Court when it previously considered similar ordinances. In those cases there existed "no requirement that the apartments in question be used for purposes which bring them under the Act." *Bowles v. Willingham*,

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[2] It must be recognized that acceptance of rent by the landlord from a person occupying the premises creates a presumption of a renewed tenancy. California Civil Code § 1945. Therefore, Vicars, who wishes to terminate the tenancies, must allow the city's beneficiaries to occupy the premises rent free.

321 U.S. 503, 517 (1944); *see also Block v. Hirsh*, 256 U.S. 135, 157 (1921). Moreover, it was also recognized that the constraints imposed on the property owner by those ordinances were limited to periods of short duration. *Bowles v. Willingham*, 321 U.S. at 513; *Block v. Hirsh*, 256 U.S. at 154, 157; *Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921). Therefore, the prior cases have not resolved the scope of the constitutional rights at issue in this case.

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## II

## THE ENACTMENT OF NEW CALIFORNIA STATE STATUTES HAS NOT MOOTED THE ISSUES RAISED IN THE PETITION

Initially, it is worthy of note that the controversy underlying this petition continues unabated. The new state law does not take effect until July 1, 1986 (Appendix to Brief of City of Berkeley at App. 29), and the city has done nothing to modify its current ordinance. Moreover, the city makes no statement that it has any intention of modifying its current ordinance despite the pending new state law. A state statute authorizing Vicars to evict his tenants after the expiration of the term for which the property is let has been in existence since 1905.[3] Calif. Code of Civ. Proc. § 1161(1). Nonetheless, the California Supreme Court has ruled that this state statutory provision

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[3] All tenancies at issue in this case have expired. Appendix to Petition for Certiorari at E-2.

authorizing "recovery of possession does not preclude limitations on grounds for eviction for the purpose of enforcing a local rent control regulation." *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 707 (1984), *prob. juris. noted on other grounds*, 105 S. Ct. 2653 (1985). What interpretation will be given the new statute remains in doubt, particularly since the California Supreme Court has expressly withheld a decision on the question of whether a local ordinance adopted for the purpose of enforcing a local rent control regulation is a "municipal affair that overrides general state law" for charter cities, such as the City of Berkeley. *Id.* at 704.

Therefore, there is a substantial question as to whether the City of Berkeley will follow the new state statute and the city's silence on this point in its presentation to this Court hardly suggests that the controversy has been resolved.

Even if the city were someday to give full effect to the new state statute the relief available to Vicars is substantially less than the rights he asserts in this case. Not only may substantial fees be imposed (Appendix to Brief of City of Berkeley at App. 29), but also substantial rights relating to the property may be exacted including a ten-year right of first refusal to reoccupy a unit returned to the market. *Id.* at App. 24 (Section 7060.2(b)(2)). Moreover, Vicars may be subject to substantial administrative requirements, *id.* at App. 25-27 (Section 7060.4), and potential actual, exemplary, and punitive damages. *Id.* at App. 22, 24 (Sections 7060.2(a)(2) and (3), 7060.2(b)(2)).

Whether or not the statute may provide some limited assistance to beleaguered owners attempting to remove

their property from the rental market it clearly falls far short of the constitutional right asserted by Vicars to withdraw from the occupation.

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## III

## UNDER CALIFORNIA LAW, CONSTITUTIONAL CLAIMS ARE PROPERLY LITIGATED IN AN UNLAWFUL DETAINER ACTION

"[California] Code of Civil Procedure section 86, subdivision (a)(4), clearly grants the municipal court jurisdiction over *all* aspects of an unlawful detainer action." *Vargas v. Municipal Court*, 22 Cal. 3d 902, 915 (1978) (emphasis in original). To comply with due process, this jurisdiction must include any "important factor in the State's determination to deprive an individual of his [claim to possession]." *Bell v. Burson*, 402 U.S. 535, 541 (1971).

Issues excluded from an unlawful detainer action are those which are "extrinsic to the narrow issue of possession, which the unlawful detainer procedure seeks speedily to resolve." *Green v. Superior Court*, 10 Cal. 3d 616, 633 (1974). Such exclusion does not include issues which "directly relate to the issue of possession." *Id.* Therefore Vicars' claim of a constitutional right to take possession was properly asserted in his unlawful detainer action. Moreover, Vicars' claim below was that the Berkeley ordinance could not prohibit the eviction of his tenants because to do so would thwart his federal constitutional rights. The California Supreme Court has expressly recognized that such claims of protection under federal law are within the

jurisdiction of the court in unlawful detainer actions stating, "The supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2) commands no less." *S. P. Growers Association v. Rodriguez*, 17 Cal. 3d 719, 726 (1976).

## IV

## THERE ARE NO STATE OR LOCAL PROCEEDINGS AVAILABLE WHEREBY VICARS COULD RECOVER JUST COMPENSATION FOR THE TAKING OF HIS PROPERTY

Initially it must be recognized that the simple straightforward issues raised by this case do not include a claim for just compensation against the city. Such a claim would clearly be outside the scope of an unlawful detainer action and would require a separate legal proceeding which Vicars has initiated. Appendix to Brief of City of Berkeley at App. 1-15. Vicars' claim in this action is limited to the assertion that the ordinance should not be applied to his circumstances because to do so would violate his constitutional rights by requiring him to turn over his property against his will to a beneficiary of the city's program without just compensation. This claim is ripe for review because California law does not allow a judicial claim for compensation. *See* Petition for Certiorari at 6. The suggestion by both the real parties in interest and the City of Berkeley that a proceeding before the city's rent stabilization board could result in an award of just compensation against the City of Berkeley is absurd.

First, the city is not a party in such a proceeding and no matter what is requested no award against the city can result.

Second, an order from the rent stabilization board does not result in an enforceable monetary award of any kind. The decision sets an "allowable rent increase" or a "maximum allowable rent." It does not require that any specific amount of money be paid over to the property owner. The effect of such a decision is limited to some manner of partial protection for the property owner against possible future charges by the city or the tenants that the owner has overcharged for future rents.

Third, the very purpose of the proceedings before the city's rent stabilization board is to *deny* the owner fair market value, which is the measure of just compensation for the property interest at stake. *United States v. Reynolds*, 397 U.S. 14, 16 (1970). The ordinance was adopted for the purpose of ensuring that the tenants and not the property owners received the benefit of any increases in the market value of the rented units.[4] If the rent stabilization board authorized Berkeley property owners to recover from the tenants an amount equal to just compensation for

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[4] Rent control is fundamentally different from other forms of property regulation. Other forms of regulation which restrict property use reduce the value of the property to any person who has an interest in use of the property. Rent control in contrast does not limit the established use of the property and therefore does not limit the value of the rental unit. It merely defines who will enjoy the value of that unit. The difference between the market value of the property as a rental unit, as measured by the price a willing renter would pay, and the price fixed by the ordinance for that unit is the measure of the value of the property interest transferred from the owner to the person occupying the unit.

the value of the use of the rental units, the board would violate the very purpose of the ordinance it is administering as well as ignoring the specific provisions of the ordinance limiting rent increases.[5]

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## CONCLUSION

The petition for certiorari presents to this Court on remarkably uncluttered facts two constitutional issues which have substantial effect on the important public policy area of the provision of rental housing. The legal standards governing the resolution of these issues have not been, but should be, clearly settled by this Court. The controversy over Vicars' right to withdraw from the occupation of providing rental housing continues unabated. If this Court does not grant certiorari Vicars will be left with a final judgment that he cannot evict his tenants for the purpose of going out of business. Regardless of any attempts to obtain relief from the City of Berkeley, the individuals occupying Mr. Vicars' units will continue to assert

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[5] It is worthy of note that the rent stabilization board which supposedly will award Vicars just compensation accused him of going out of business as an inappropriate response to an order of that board directing him to *reduce* his rents. Appendix to Brief of City of Berkeley at App. 13.

their entitlement both to the use and enjoyment of Mr. Vicars' property and to his services as necessary to sustain their use and enjoyment. For these reasons the petition for certiorari should be granted.

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